90-889

No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM "SKY" KING, PETITIONER

v.

ST. VINCENT'S HOSPITAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether an employee's right under 38 U.S.C. 2024(d) to a leave of absence from employment to serve in the Armed Forces of the United States is conditioned on the "reasonableness" of the employee's request for leave.

PARTIES TO THE PROCEEDING

The parties in the court of appeals were petitioner William "Sky" King, who is represented by the United States pursuant to 38 U.S.C. 2022, and St. Vincent's Hospital.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
Reasons for granting the petition	6
Conclusion	22
Appendix A	1a
Appendix B	13a
Appendix C	23a
Appendix D	24a
Appendix E	25a
Appendix F	27a

TABLE OF AUTHORITIES

Cases:

Alabama Power Co. v. *Davis*, 431 U.S. 581 (1977)	7, 12
Board of Governors v. *Dimension Fin. Corp.*, 474 U.S. 361 (1986)	17
Burkart v. *Post-Browning, Inc.*, 859 F.2d 1245 (6th Cir. 1988)	18
Burlington N. R.R. v. *Oklahoma Tax Comm'n*, 481 U.S. 454 (1987)	14
Chappell v. *Wallace*, 462 U.S. 296 (1983)	13
Church of the Holy Trinity v. *United States*, 143 U.S. 457 (1892)	6
Coffy v. *Republic Steel Corp.*, 447 U.S. 191 (1980)	12
Cronin v. *Police Dep't*, 675 F. Supp. 847 (S.D.N.Y. (1987)	12
Eidukonis v. *Southeastern Pennsylvania Transp. Auth.*, 873 F.2d 688 (3d Cir. 1989)	12, 15, 16, 18
Fishgold v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946)	12
Gilligan v. *Morgan*, 413 U.S. 1 (1973)	13
Gulf States Paper Corp. v. *Ingram*, 811 F.2d 1464 (11th Cir. 1987)	4, 5, 15

Cases—Continued: Page

Hallstrom v. *Tillamook County*, 110 S. Ct. 304 (1990) 12
Kolkhorst v. *Tilghman*, 897 F.2d 1282 (4th Cir. 1990), petition for cert. pending, No. 89-1949 ..... 12, 15, 19, 20
Lee v. *City of Pensacola*, 634 F.2d 886 (5th Cir. 1981) 18
Mallard v. *United States District Court for the Southern District of Iowa*, 109 S. Ct. 1814 (1989) 12
Monroe v. *Standard Oil Co.*, 452 U.S. 549 (1981) 5, 11, 13, 15, 19, 21
Perpich v. *Department of Defense*, 110 S. Ct. 2418 (1990) 9, 10, 11
Rostker v. *Goldberg*, 453 U.S. 57 (1981) 13
Sawyer v. *Swift & Co.*, 836 F.2d 1257 (10th Cir. 1988) 18, 21
United States v. *Rutherford*, 442 U.S. 544 (1979) 13

Statutes and regulation:

Act of June 15, 1933, ch. 87, § 582, 48 Stat. 155 9
Act of July 12, 1960, Pub. L. No. 86-632, 74 Stat. 467 ..... 10-11, 14
Act of May 2, 1986, Pub. L. No. 99-290, 100 Stat. 413:
§ 1(a), 100 Stat. 413 8
§ 1(c), 100 Stat. 413 8
Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481 10
Department of Defense Authorization Act, 1980, Pub. L. No. 96-107, Tit. IV, § 401(b), 93 Stat. 807 2
Department of Defense Appropriation Act, 1980, Pub. L. No. 96-154, Tit. I, 93 Stat. 1139 11
Veterans Rehabilitation and Education Amendments of 1980, Pub. L. No. 96-466, § 511(b), 94 Stat. 2207 16-17
Vietnam Era Veterans' Readjustment Assistance Act of 1974, Tit. IV, ch. 43, 38 U.S.C. 2021 *et seq.* (Veterans' Reemployment Rights Act) 3

Stautes and regulation—Continued: Page

38 U.S.C. 2021-2026 10
38 U.S.C. 2021(a) 10
38 U.S.C. 2021(b)(1) 10
38 U.S.C. 2021(b)(3) 11, 15, 19, 20, 21
38 U.S.C. 2022 7
38 U.S.C. 2024(a) 10
38 U.S.C. 2024(b)(1) 10
38 U.S.C. 2024(c) 10, 14, 15
38 U.S.C. 2024(d) ..... *passim*
38 U.S.C. 2024(f) 4, 11, 16, 17
38 U.S.C. 2025 7
10 U.S.C. 101(9) 9
10 U.S.C. 261 9
10 U.S.C. 267(a) 9
10 U.S.C. 672(a) 10
10 U.S.C. 672(b) 10
10 U.S.C. 672(d) 11
10 U.S.C. 673a 10
10 U.S.C. 673b 9, 10
32 U.S.C. 314(a) 2
32 U.S.C. 502 ..... 4, 11, 17
32 U.S.C. 502(f) 3, 11, 15
38 U.S.C. 2002A 7
38 U.S.C. 2002A(b)(1) 7
Army Reg. 136-18, ch. 2, § II (1985) 3, 16

Miscellaneous:

England, *The Active Guard/Reserve Program: A New Military Personnel Status*, 106 Mil. L. Rev. 1 (1984) 11
H.R. Rep. No. 1066, 82d Cong., 1st Sess. (1951) 9
H.R. Rep. No. 1069, 94th Cong., 2d Sess. (1976) 9
H.R. Rep. No. 498, 96th Cong., 1st Sess. (1979) 17
H.R. Rep. No. 504, 99th Cong., 2d Sess. (1986) 8
Manpower Requirements Rep., DOD 1991 Fiscal Year 9
Reserve Forces Policy Board, DOD 1989, Ann. Rep. 8
S. Rep. No. 1672, 86th Cong., 2d Sess. (1960) 14
1980 U.S. Code Cong. & Admin. News 4617 17

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v.

ST. VINCENT'S HOSPITAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of William "Sky" King, petitions for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 901 F.2d 1068. The opinion of the district court (App., *infra*, 13a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1990. A petition for rehearing was denied on August 21, 1990. App., *infra*, 24a. A suggestion for rehearing en banc was denied on August 29, 1990. App., *infra*, 25a-26a. On November 9, 1990, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

38 U.S.C. 2024(d) of the Veterans' Reemployment Rights Act provides, in pertinent part:

> Any employee not covered by [section 2024 (c)] who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training * * * such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes.

STATEMENT

1. In June 1987, William "Sky" King, a 35-year veteran of the Alabama National Guard, applied for the position of Command Sergeant Major, which is the highest position for an enlisted member of the state National Guard. The Command Sergeant Major, who assists and advises the Adjutant General[1] on personnel matters, serves in the Active Guard/Reserve (AGR) Program, App., *infra*, at 3a, 27a, which Congress created in 1980. See Department of Defense Authorization Act, 1980 (DOD Act), Pub. L. No. 96-107, Tit. IV, § 401(b), 93 Stat. 807. The AGR program authorizes members of the Military Reserves and the National Guard of the United States to serve

[1] The Adjutant Major is the commanding officer of the Alabama National Guard. See 32 U.S.C. 314(a). He is appointed by the Governor of Alabama.

full-time tours of duty for the purposes of "organizing, administering, recruiting, instructing, or training the reserve components." *Ibid.* Army regulations require AGR personnel to serve three-year tours of duty. Army Reg. 136-18, ch. 2, § II, at 2-9 (1985).

On July 18, the Alabama National Guard informed King that he had been selected for the position of Command Sergeant Major, and King accepted immediately. App., *infra*, at 3a-4a. King then notified his supervisor at St. Vincent's Hospital, where King was employed as manager of the security department, that he had accepted a three-year position with the Alabama National Guard. *Id.* at 4a. On August 7, the Guard told King that his duties would begin on August 17, and King began his tour of duty on that day. *Ibid.*

On September 8, 1987, after considering King's leave request, his employer notified him by letter that his request was denied. The letter stated that, in the employer's view, King did not qualify for leave under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.*, Chapter 43 of which is known as the Veterans' Reemployment Rights Act (VRRA or the Act), and that his request for such a lengthy period of leave was unreasonable. App., *infra*, at 5a.

2. The hospital filed a declaratory judgment action in the United States District Court for the District of Alabama to determine whether King was entitled under the VRRA to a leave of absence for the duration of his three-year tour of duty. The district court noted that King's orders fell within the scope of Section 2024(d).[2] App., *infra*, 18a & n.8. The court

[2] The court observed that King was ordered to duty under 32 U.S.C. 502(f), which provides, in pertinent part:

concluded that King's reemployment rights were governed by the latter section, which states, in pertinent part, that the employee

> shall upon request be granted a leave of absence by [his] employer for the period required to perform active duty for training * * * in the Armed Forces of the United States.

Applying the reasonableness test set forth in the Eleventh Circuit's decision in *Gulf States Paper Corp.* v. *Ingram*, 811 F.2d 1464, 1469 (1987),[3] the court

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Under regulations to be prescribed by the Secretary of the Army, * * * a member of the National Guard may

(1) without his consent, but with the pay and allowances provided by law; or

(2) with his consent, either with or without pay and allowances;

be ordered to perform training or other duty in addition to that prescribed under subsection (a). * * *

The court explained that, under 38 U.S.C. 2024(f), full-time duty performed by a National Guard member under Section 502 is considered "active duty for training" under Section 2024(d). App., *infra*, 18a n.8.

[3] In *Gulf States*, the court identified three factors to be taken into account in evaluating the reasonableness of a request for leave under 38 U.S.C. 2024(d): "the length of the leave, [the employee's] actions, and the burden upon [the employer] in filling [the] position during [the] absence." 811 F.2d at 1469.

The *Gulf States* court stated that the employee's request enjoys a presumption of reasonableness, that "burden on the employer alone is not enough" to defeat the presumption, and that "the weightiest factor in overcoming the presumption is the conduct of the employee." 811 F.2d at 1469. Only "conduct akin to bad faith on the employee's part" will lead to a finding of unreasonableness. *Ibid.* In a footnote, see *id.* at 1470 n.4, the court acknowledged that "bad faith conduct

determined that, apart from the length of the leave, King's conduct in requesting leave was not blameworthy. App., *infra*, 18a-21a. The court held, however, that a three-year leave request was *per se* unreasonable, and that King was therefore not entitled to reemployment rights under Section 2024(d). *Id.* at 21a-22a.

3. The court of appeals for the Eleventh Circuit affirmed, with Judge Roney concurring in part and in the result. The court relied heavily on its previous analysis in *Gulf States*. There, the court of appeals, although acknowledging that "the statute does not address the 'reasonableness' of a reservist's leave request," engrafted a "reasonableness" requirement onto Section 2024(d). App., *infra*, 7a. In the present case, the court of appeals reiterated the determination in *Gulf States* that the reasonableness of a request was dependent, in large part, on the reservist's conduct, and that a request for leave "of exceptional duration," App., *infra*, 8a, might amount to bad faith conduct justifying denial of leave. *Ibid.* The court described as "self-contradictory" the legislative history of Section 2024(d), and noted the Supreme Court's statement in *Monroe* v. *Standard Oil Co.*, 452 U.S. 549, 555 (1981), that Section 2024(d) was enacted "to deal with problems faced by employees who had military training obligations lasting less than three months." App., *infra*, 11a. Observing that "[n]o case has been called to our attention in which a leave of absence of as long as three years has

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might also be shown through requests for leaves of exceptional duration." And, in holding that the one-year leave request at issue in that case was "not *per se* unreasonable," the *Gulf States* court added that "a greater length of time might reach that level." *Id.* at 1469.

been held protected under Section 2024(d)," *ibid.*, the court invoked *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892), for the proposition that a "literal construction" of the statute must be rejected if required to "prevent an absurd, unjust, or unintended result." App., *infra*, 9a-10a. The court then found it necessary "to determine a definite limit beyond which any leave would be unreasonable," and decided that a three year leave was *per se* unreasonable. *Id.* at 11a. Without elaboration, the court added that, "even if we should find that the trial court erred in finding a three-year leave *per se* unreasonable, we would nevertheless hold that on the facts of this case, considering the factors outlined in *Gulf States*, the judgment of the trial court should be affirmed." *Ibid.*

In a separate opinion, Judge Roney agreed with the court's holding that King's three-year leave request "was unreasonable on the facts of this case," but dissented from the adoption of a *per se* rule. In Judge Roney's view, the panel majority approach "might work an injustice in some future case." App., *infra*, 12a.

REASONS FOR GRANTING THE PETITION

This case presents a question of statutory interpretation on which the courts of appeals are divided. In view of Congress's increasing reliance on the reserve forces as an integral part of the Nation's military preparedness, the question is one of great importance.

Congress enacted the Veterans' Reemployment Rights Act (VRRA) to protect the employment status of all individuals serving in the Armed Forces. Section 2024(d) was designed to enable citizens to serve in the National Guard and the Federal reserve units free from economic insecurity. Because service

in the Armed Forces is voluntary, the readiness and integrity of the fighting forces depend on the willingness of citizens to volunteer for such service. The right to reemployment without penalty is an important benefit conferred by Congress on reserve volunteers and thus is an essential tool for fulfilling the manpower needs of the reserves. See generally *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 583 (1977) (the VRRA "provides the mechanism for manning the Armed Forces of the United States.").[4]

By engrafting onto the statute a "reasonableness" requirement, the court of appeals seriously misconstrued the language of the statute and undermined its purpose. In so doing, the court of appeals not only substantially curtailed the protections afforded

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[4] Responsibility for administration of the reemployment rights provisions of Title 38 is vested in the Department of Labor under 38 U.S.C. 2002A. That Section establishes within the Department of Labor an Assistant Secretary for Veterans' Employment and Training "who shall be the principal advisor to the Secretary with respect to the formulation and implementation of all departmental policies and procedures to carry out * * the purposes of * * * chapter 43 of this title" (which includes the reemployment rights provisions for reservists). Section 2002A(b)(1) requires the Secretary of Labor to "carry out all provisions of * * * chapter 43 * * * through the Assistant Secretary * * * and administer through [him] all programs under the jurisdiction of the Secretary for the provision of employment * * * services designed to meet the needs of * * * eligible veterans."

In addition, 38 U.S.C. 2025 requires the Secretary, through the Office of Veterans' Reemployment Rights, "[to] render aid in the replacement in their former positions or reemployment of persons who have satisfactorily completed any period of active duty in the Armed Forces." And 38 U.S.C. 2022 authorizes the United States to represent individuals, like petitioner, in actions involving reemployment rights.

by the VRRA, but created an indeterminate and vague standard that generates uncertainty among employers and potential recruits and frustrates Congress's decision to provide economic security to those who serve in the reserves.[5] In addition, the strict durational limit imposed by the court of appeals in this case creates a powerful disincentive to service in training and other positions, such as the AGR, that require a significant commitment of time. As a result, the rigid *per se* rule established by the court will impair the ability of the reserves to fill these pivotal positions.[6] In light of the conflict in the cir-

[5] Congress has recently stressed the connection between military preparedness and reemployment rights. In a 1986 Joint Resolution, Congress found that "the National Guard and Reserve forces of the United States are an integral part of the total force policy of the United States for national defense." It further found that "attracting and retaining sufficient numbers of qualified persons to serve in the Guard and Reserve is a difficult challenge" and, consequently, "the support of employers and supervisors in granting employees a leave of absence from their jobs to participate in military training without detriment to earned vacation time, promotions, and job benefits is essential to the maintenance of a strong Guard and Reserve force." Act of May 2, 1986, Pub. L. No. 99-290, § 1(a), 100 Stat. 413. Congress called upon "employers and supervisors of employees who are members of the National Guard or Reserve to abide by the provisions of chapter 43 of title 38, United States Code." Pub. L. No. 99-290, § 1(c), 100 Stat. 413. See also, H.R. Rep. No. 504, 99th Cong., 2d Sess. 2 (1986).

[6] As of September 30, 1989, there were almost 34,000 members of the Army and Air National Guard serving tours in the AGR program. See Reserve Forces Policy Board, DOD, 1989 Ann. Rep. at 49. In fiscal year 1989, approximately 12,500 additional reservists and National Guard members served on "active duty for training" under orders specifying a period

cuits over the nature of the protection afforded by Section 2024(d), the clear interpretive error in the Eleventh Circuit's ruling, and the potential impact of this decision, review by this Court is warranted.

1. a. The modern National Guard traces its history to 1933, when Congress established a dual-enlistment system (see Act of June 15, 1933, ch. 87, § 582, 48 Stat. 155), under which every member of the Army National Guard and the Air National Guard is "a Federal reservist as well as a State militiaman." H.R. Rep. No. 1066, 82d Cong., 1st Sess. 9 (1951). See *Perpich* v. *Department of Defense*, 110 S. Ct. 2418, 2425 (1990). National Guard members, in their federal capacity, are part of the Reserve Corps (known as the Ready Reserve) of the Army.[7] The Army National Guard, in combination with the Army Reserve, provide more than half of the combat-ready units of the "Total Army." See, *e.g.*, H.R. Rep. No. 1069, 94th Cong., 2d Sess. 3-5 (1976) (reserve components have become co-equal partners with the active forces in the national defense). Guard members are available to be called to active duty in excess of those in the regular Army during a war or

of duty of 180 days or more. See Manpower Requirements Rep., DOD 1991 Fiscal Year at III-55, IV-49, and VI-43, 44.

[7] The National Guard of the United States is comprised of the Army National Guard and the Air National Guard, 10 U.S.C. 101(9), which are two of the country's seven Reserve force components. See 10 U.S.C. 261. The remaining five components are the Naval, Marine, Coast Guard, Army and Air Force Reserves. All reserve members are assigned to one of three distinct categories created under 10 U.S.C. 267(a): (1) Ready Reserves, (2) Standby Reserves and (3) Retired Reserves. All National Guard members are part of the Ready Reserves.

national emergency. 10 U.S.C. 672(a), 673(a). In addition, the President, with notice to Congress, may call up members of the National Guard for "active duty or active duty for training" in the absence of a national emergency. See Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481. See also *Perpich*, 110 S. Ct. at 2425; 10 U.S.C. 672(b), 673a, 673b (active duty).

The most recent codification of reemployment rights for members of the National Guard and other reserve units is found in the VRRA, 38 U.S.C. 2021-2026. Section 2024(a) protects the reemployment rights of those who enlist in the armed forces proper and Section 2024(b)(1) protects the reemployment rights of reservists ordered to active duty. Reservists returning from active duty are entitled to reemployment in their previous job or in a "position of like seniority, status, and pay" after an absence of up to four years, or longer under certain circumstances, and must claim their rights within 90 days of discharge. Sections 2024(a) and (b)(1). Veterans returning from active duty may not be discharged without cause for one year after reemployment. 38 U.S.C. Section 2021(b)(1). Under 38 U.S.C. 2024(c), reservists performing initial active duty training for a continuous period of less than 12 weeks must apply for reemployment within 31 days of discharge and may not be discharged without cause for six months following reemployment.

The provision at issue in this case, 38 U.S.C. 2024(d), enacted in 1960, entitles reservists and National Guard members to a "leave of absence * * * for the period required to perform active duty for training or inactive duty training." See Act of July 12,

1960, Pub. L. No. 86-632, 74 Stat. 467.[8] Section 2024(d), unlike the provision that covers "active duty," contains no limitation on the length of service. Reservists are entitled to reinstatement in the same position they previously occupied if they report back to work "at the beginning of the next regularly scheduled working period." *Ibid.*[9]

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[8] Section 2024(f) expressly provides that, for the purpose of Section 2024(d),

> full-time training or other full-time duty performed by a member of the National Guard under section * * * 502 * * * of title 32 is considered active duty for training.

Although King was ordered to active duty under 10 U.S.C. 672(d) for a brief period at the beginning of his tour (during which he was required to leave the country), his orders to serve "full-time duty (State) in Active Guard/Reserve status" were authorized under 32 U.S.C. 502(f). See App., *infra*, 27a-28a. Because King received his orders for full-time duty under Section 502 of 32 U.S.C., which governs service in the state National Guard, and was not called to "active duty" as authorized by various provisions under Title 10, he remained under the command and control of the State Adjutant General, whom he was assigned to assist. See, *Perpich*, 110 S. Ct. at 2425 ("a member of the [National] Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the state Guard for the entire period of federal service"). See also Department of Defense Authorization Act, 1980, Pub. L. No. 96-154, Tit. I, 93 Stat. 1141; and see generally England, *The Active Guard/Reserve Program: A New Military Personnel Status*, 106 Mil. L. Rev. 1, 16-28 (1984) (explaining AGR personnel classification scheme).

[9] Reservists also receive protection against discharge, demotion, withdrawal of benefits, or other forms of discrimination upon return from, or on account of, service of a period of training or duty. Under 38 U.S.C. 2021(b)(3), a person cannot be denied "retention * * * promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." See *Monroe* v. *Standard Oil Co.*, 452 U.S. 549, 557-559 (1981).

b. "Interpretation of a statute must begin with the statute's language." *Mallard* v. *United States District Court for the Southern District of Iowa*, 109 S. Ct. 1814, 1818 (1989); *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 308 (1990). Section 2024(d) of Title 38 is written in broad and unqualified terms. It mandates that leave for reserve duty covered by that section "shall upon request be granted," and that reservists "shall be permitted to return to [the] position[s]" they would have occupied "had [they] not been absent for such purposes." True to the statute's broad sweep, the courts have expressly acknowledged the unconditional language of Section 2024(d). As the Third Circuit recently observed, "[Section] 2024(d) does not contain on its face any limitation of the duration of the leave of a reservist for the purpose of carrying out duty for training." *Eidukonis* v. *Southeastern Pennsylvania Transp. Auth.*, 873 F.2d 688, 693 (1989). See also *Kolkhorst* v. *Tilghman*, 897 F.2d 1282, 1286 (4th Cir. 1990) (language of Section 2024(d) is "unequivocal and unqualified"), petition for cert. pending, No. 89-1949; *Cronin* v. *Police Dep't*, 675 F. Supp. 847, 850 (S.D.N.Y. 1987) ("[Section] 2024(d) contains no express limitation with respect to the duration of protected military leave for training.").

Adherence to the language of the statute as written is all the more appropriate given this Court's repeated admonition that the reemployment rights provisions are "to be liberally construed for the benefit of those who * * * serve their country." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); accord *Coffy* v. *Republic Steel Corp.*, 447 U.S. 191, 196 (1980); *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 584 (1977). There is no basis for judicial qualification of the unqualified terms of Section 2024(d), since application of the statute as written does not produce "consequences * * * at variance with the policy of the enactment as a whole." *United States* v. *Rutherford*, 442 U.S. 544, 552 (1979). To the contrary, faithful adherence to the broad terms of the statute is entirely consistent with Congress's evident goals in enacting the VRRA: to guarantee reservists the benefit of secure employment and to remove an important disincentive to service in the reserve forces.

As stated in *Monroe* v. *Standard Oil Co.*, 452 U.S. at 565, "[t]his Court does not sit to draw the most appropriate balance between benefits to employee-reservists and costs to employers. That is the responsibilty of Congress." Congress has performed the calculus by authorizing bona fide tours of duty requiring substantial time commitments and by conferring protection on reservists who undertake them. That should be the end of the matter, regardless of the context. However, the courts should be especially chary of interfering with the exercise of legislative or executive authority over military affairs. See, *e.g.*, *Chappell* v. *Wallace*, 462 U.S. 296, 301 (1983); *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981). As stated in *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973) (emphasis omitted), "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches."

c. Nothing in the history of the VRRA generally, or of Section 2024(d) in particular, points to an in-

terpretation at odds with the statutory text.[10] The bill that originally contained Section 2024(d), enacted in 1960, had two principal stated goals, neither of which involved any limitations, durational or otherwise, on leaves of absence under that section. See Act of July 12, 1960, Pub. L. No. 86-632, 74 Stat. 467. First, in a provision codified at 38 U.S.C. 2024 (c), the bill extended to National Guard members the same reemployment protection enjoyed by other reservists who were called to perform "an initial period of active duty for training of 3 to 6 months." S. Rep. No. 1672, 86th Cong., 2d Sess. 1-2 (1960). Second, the bill was designed to "adjust the time period within which leave of absence rights must be asserted" after the performance of training duty other than an initial period of training covered under Section 2024(c). S. Rep. No. 1672, *supra*, at 1. Accordingly, Section 2024(d) requires that, to qualify for protection, reservists returning from "active duty for training or inactive duty training" must return to work "at the beginning of [the] next regularly scheduled working period * * *." *Id.* at 2-3. Apart from this requirement, and that of a "request" to the employer for leave, that Section placed no conditions or limits on the assertion of reemployment rights following a tour of duty falling within its scope.

The 1960 Senate Report on Section 2024(d) states that the Section provides protection for trainees who are absent from employment for short periods, such as two-hour drills, weekend drills, two-week annual encampments, or special training or instruction periods lasting for 30, 60, or 90 days. S. Rep. No. 1672, *supra*, at 2. At least one court of appeals has

[10] Indeed, in view of the clarity of the statutory text, resort to legislative history should not be necessary. See *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987).

relied in part on this commentary to construe Section 2024(d) as imposing a requirement that a request for leave be reasonable. See *Eidukonis* v. *Southeastern Pennsylvania Transp. Auth.*, 873 F.2d 688, 693 (3d Cir. 1989); see also App., *infra*, 10a. But this history does not support that conclusion.[11]

At the time Section 2024(d) was enacted, members of the "Ready Reserve" had only short and intermittent training obligations, such as those described in the Senate Report. But in response to a fundamental shift in the structure of the Nation's armed forces, the landscape has been altered dramatically over the past generation. Now, the Nation relies heavily on voluntary reservists as a critical component of the potential fighting force. To ensure the readiness of reserve units, Congress has established new training programs and expanded the number and type of positions that must be filled by reservists, including members of the National Guard. See *Kolkhorst* v. *Tilghman*, 897 F.2d at 1285 n.*; see also, *e.g.*, *Gulf States*, 811 F.2d at 1466 (leave requested under Section 2024(d) to enroll in a one-year train-

[11] It is likely that the 1960 Senate Report, which reflects the range of training duty obligations that existed at that time, was the source of the Court's dictum in *Monroe* that Section 2024(d) "was enacted in 1960 to deal with problems faced by employees who had military training obligations lasting less than three months." 452 U.S. at 555. Alternatively, this remark may have been based on the terms of a different provision, 38 U.S.C. 2024(c), that protects reservists for 12 weeks of initial active duty for training. In any event, this observation in *Monroe* is of limited significance to the interpretation of Section 2024(d), as the statement was made in the course of a ruling on the meaning of yet another section of the statute, Section 2021(b)(3), and the Court neither discussed nor considered the various types of training covered under Section 2024(d) that might require significantly longer time commitments.

ing program sponsored by the Army Reserve in response to an acute shortage of nurses); *Eidukonis*, 873 F.2d at 690-692 (leave requested under Section 2024(d) to participate in weapons firing range computer project). Among these are the "full-time support" positions to train reserve units and administer the reserve program which Congress saw fit to authorize in 1980 through the Active Guard/Reserve Program. Army regulations established corresponding duty obligations for the period necessary to provide proper training and continuity in those positions. Army Reg. 136-18, ch. 2, § II, at 2-9 (1985).

Many of these new forms of service, including the AGR program for National Guard members, are classified as "active duty for training" within the meaning of Section 2024(d). See, *e.g.*, notes 2, 6, 8, *supra*; Section 2024(f). These newer positions are thus clearly within the coverage of that Section. In light of Congress's choice of unconditional language, and the absence of durational or other substantive limits, Section 2024(d) should be construed to protect reservists who undertake to serve in any official reserve program coming within the scope of the Section, regardless of the length of service.

In any event, whatever the legislature's intent at the time 2024(d) was first enacted, Congress later modified the VRRA to extend the benefits of Section 2024(d) to reservists serving in the AGR program, and did so as part of its emphasis on the importance of that program. Shortly after the program's creation, Congress amended 38 U.S.C. 2024(f) to provide that members of the National Guard performing "full-time training or other full-time duty" under 32 U.S.C. 502(f) would be considered on "active duty for training," and thus would be entitled to protection under Section 2024(d). See Veterans' Rehabilitation and

Education Amendments of 1980, Pub. L. No. 96-466, § 511(b), 94 Stat. 2207.[12] By amending Section 2024(f) to cover those serving in the AGR program under Section 502, Congress made clear beyond doubt that Section 2024(d) benefits were intended not only for those called to duty of short duration, but also for reservists in King's situation.

To be sure, most Ready Reservists invoke the protections of Section 2024(d) for shorter periods of training—ordinarily, one weekend of inactive duty training per month and 12 days of active duty training per year. But it does not follow that Congress intended reservists on short-term training to be the *exclusive* beneficiaries. See *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 371 (1986) (Congress's choice of general language demonstrates that, although "legislation may have been prompted by the needs" of specific members of a class, "Congress intended to [cover] the class.") To the con-

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[12] As explained in the House Report,

> Members of reserve components who are ordered to active duty for training are entitled to be reemployed by their private employers following their releases from that duty. Full-time training or duty by members of the National Guard under Sections 503-505 of title 32, U.S. Code, is treated like active duty for training for this purpose. *It is now possible to perform full-time training or duty under title 32, U.S. Code, section 502 as well as under sections 503-505.* In order to reflect this, section 502 should be added to the enumeration in section 2024(f) of title 38, U.S. Code. *This section would provide the same reemployment rights following periods of full-time training or duty under title 32, U.S. Code, section 502, as current law provides following duty under Sections 503-505 of title 32, U.S. Code.*

H.R. Rep. No. 498, 96th Cong., 1st Sess. 49 (1979) (emphasis added); see also Explanatory Statement, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4617, 4646.

trary, that provision squarely covers less common situations as well, since it embodies Congress's determination that the Section applies without regard to the length of the leave or other factors that would take away the job security of the reservists who come within its terms. Indeed, as noted, reservists like King—although representing a minority of all those subject to 2024(d)—play a critical role in Congress's plan for maintaining a ready and efficient reserve force.

2. The courts of appeals are divided on the proper interpretation of Section 2024(d). In addition to the court below, the Third Circuit has decided that there is a "reasonableness" test under Section 2024(d), although it has developed a somewhat different formulation. See *Eidukonis* v. *Southeastern Pennsylvania Transp. Auth.*, 873 F.2d at 695-696 (courts should inquire into the length of the leave, the employee's options to schedule the leave at other times, the amount of notice provided, whether the request is for an extension, whether the employee obtained legal advice, the employer's burden and ability to find a substitute, and the sufficiency of the employer's notice to its employees regarding leave policy.) The Fifth Circuit, in *Lee* v. *City of Pensacola*, 634 F.2d 886 (1981), a case relied on by the Eleventh Circuit in *Gulf States*, has also held that a request under Section 2024(d) must be "reasonable." [13]

[13] In addition, the Sixth and Tenth Circuits have addressed the question whether and to what extent a request for leave under Section 2024(d) is subject to a requirement of adequate notice. See *Sawyer* v. *Swift & Co.*, 836 F.2d 1257, 1260-1261 (10th Cir. 1988) (Section 2024(d) does not forbid an employer to require "adequate notice of impending leave); *Burkart* v. *Post-Browning, Inc.*, 859 F.2d 1245, 1247-1248 (6th Cir. 1988) (suggesting same). The *Lee* case, cited in text, also involved, *inter alia*, a question of the adequacy of notice. In the present case, respondent has not asserted that the notice given was inadequate.

In contrast, the Fourth Circuit has held, correctly, in our view, that there is no requirement under Section 2024(d) that a leave request be "reasonable." *Kolkhorst* v. *Tilghman*, 897 F.2d 1282, 1286 (1990), petition for cert. pending, No. 89-1949.[14] In *Kolkhorst*, a municipal police department placed a strict upper limit on the number of officers in the department who could serve as reservists at any one time. The plaintiff in that case was denied permission by his supervisor to join a Marine Corps reserve unit because the department had exceeded the quota. The Fourth Circuit held that the police department's limit on the number of reservists in the department violated Section 2024(d).

The court stated that "the reasonableness standards that have been imposed by other courts are contrary to the purpose of Section 2024(d) to allow reservists to train with their military units without suffering prejudice or any adverse action from their employers." It held that "reasonableness is [not] required under Section 2024(d)." 897 F.2d at 1286. The court noted that "the VRRA unconditionally provides that any reservists '*shall* upon request be granted a leave of absense by such person's employer for the period required to perform' " the pertinent duty. *Ibid.* Quoting *Monroe* v. *Standard Oil Co.*, 452 U.S. at 555, the court observed that, under that

[14] The Solicitor General will shortly file a brief in response to the Court's request on October 1, 1990, for the views of the United States on whether the petition for certiorari in *Kolkhorst* should be granted.

Section, "employees *must* be granted a leave of absence * * * and, upon their return, be restored to their position * * *." 897 F.2d at 1286. The court concluded that "[t]here is nothing in the VRRA, its legislative history, or the *Monroe* decision to indicate that a reservist is entitled to a leave of absence * * * *only* if the request is reasonable based on a judicially created standard that varies from one jurisdiction to the next." *Ibid.*[15]

Although *Kolkhorst* involves a numerical limit, whereas this case presents a durational one, there is a clear-cut difference in the two interpretations of Section 2024(d)—a difference that would have resulted in a different outcome had the Fourth Circuit decided this case. King plainly would be entitled to the full protections of Section 2024(d) under the Fourth Circuit's holding that the statute does not

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[15] The Fourth Circuit went on to state that "[e]ven if a standard of reasonableness were applied to Section 2024(d), we believe that Kolkhorst's request for training leave was reasonable and that the [police] Department's policy limiting to one hundred the number of police officers that are eligible to serve as active military reservists is unreasonable *per se* under any possible formulation of the test." 897 F.2d at 1286-1287.

The Fourth Circuit also held that the police department's action was invalid as a violation of Section 2021(b)(3) of the VRRA, which forbids the denial of "hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." See 897 F.2d at 1284-1285. Because the department "planned to fire Kolkhorst, without cause, if he insisted on exercising his statutory right to train with a military reserve unit," the court held that the employer had impermissibly "encroach[ed] upon the normal incidents and advantages of Kolkhorst's employment" in violation of that provision. *Id.* at 1285.

permit a court to consider the reasonableness of a request for leave.[16] The court of appeals in this case took a contrary view. Inasmuch as the question is one of great importance to the effective operation of the reserve program, this Court should grant review to resolve the conflict.

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[16] Although the Fourth Circuit concluded, in the alternative, that Kolkhorst would be entitled to job protection even if a reasonableness test were appropriate under Section 2024(d), it is clear from the opinion that the court's rejection of any such limit on Section 2024(d) rights is controlling law of the circuit and would determine the outcome of any future case.

In *Kolkhorst*, the court also found that the police department's action violated the anti-discrimination provision of Section 2021(b)(3). Although it is possible to challenge an employer's denial of leave as a discriminatory action in violation of Section 2021(b)(3), not every denial of leave that violates Section 2024(d) will also constitute a violation of Section 2021(b)(3), and thus the rights conferred by the two sections are not co-extensive. As this Court stated in *Monroe*, *supra*, Section 2021(b)(3) was enacted for the "significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion, motivated *solely by reserve status*." 452 U.S. at 559 (emphasis added). Thus, for example, Section 2021(b)(3) would *not* prohibit the denial of a leave of absence, or discharge or other adverse atcion by an employer based on the *duration* of an employee's leave of absence, as long as the employer was applying a reasonable, neutral policy formulated without regard to the reason for leave. See, *e.g.*, *Sawyer* v. *Swift & Co.*, 836 F.2d at 1261-1262. Thus, in King's case, even if the hospital's action had been challenged under both Sections 2024(d) and 2021(b)(3), a finding that Section 2024(d) had been violated would not require a finding that Section 2021(b)(3) had been violated. Indeed, the employer's action may well have been valid under the latter Section.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 89-7392

ST. VINCENT'S HOSPITAL, a corporation,
PLAINTIFF-APPELLEE

v.

WILLIAM "SKY" KING,
DEFENDANT-APPELLANT

May 22, 1990

Appeal from the United States District Court
for the Northern District of Alabama

Before TUTTLE*, RONEY*, and HILL*, Senior Circuit Judges.

TUTTLE, Senior Circuit Judge:

This appeal arises from a declaratory judgment action brought by St. Vincent's Hospital (St. Vincent's) to determine its obligations under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §§ 2021 *et seq.*, commonly known as

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

the Veterans' Reemployment Rights Act. St. Vincent's had denied a three year leave of absence requested by its employee King, a sergeant major in the Alabama National Guard because King contended that he was entitled to reemployment rights following the termination of a three year tour of duty with the Alabama National Guard. St. Vincent's filed this declaratory judgment action seeking to have the court declare it not to be liable for King's reemployment under the Act.

The trial court found that King's request for a three year leave of absence was "unreasonable" and entered judgment in favor of St. Vincent's.

I. STATEMENT OF FACTS

The parties stipulated to the facts which were then considered by the trial court, together with depositions on file. We find that the trial court properly summarized the agreed upon facts as follows:

> King was employed by the Hospital on September 24, 1979 as manager of its security department. (The department was subsequently renamed Protective Services in 1987.) King supervised twenty-one employees in his department including three full-time supervisors. He advised the Hospital on many matters pertaining to the safety and welfare of its employees and patients.
>
> King characterized his position with the Hospital as a fairly high profile public relations position. The job involved constant contact with patients, employees, and the general public. He also had to deal with the Hospital's professional staff of doctors on a daily basis.

> King has been a reserve member of the Alabama National Guard for thirty-five years. During his employment with St. Vincent's King served on numerous tours of training, some of which were military leaves of absence from St. Vincent's and some of which were taken on his own vacation time, personal days off, or weekends when he was not scheduled to work.
>
> While on an annual two week National Guard leave in June, 1987, King submitted an application for the position of State Command Sergeant Major for the Alabama National Guard. The Command Sergeant Major is an advisor to the Adjutant General on all matters concerning the performance, training, appearance and conduct of enlisted personnel. King knew this was a full time position with the Alabama National Guard and that it required a three-year commitment.
>
> Upon his return to work in late June, King did not inform anyone at the Hospital that he had applied for the Command Sergeant Major position.
>
> King checked on his reemployment rights by telephoning James A. Bishop, a reemployment compliance specialist with the Veterans Reemployment Rights office in Atlanta, Georgia. Bishop advised King that he could serve up to four years on "active duty" and have reemployment rights under the Veterans' Reemployment Rights Act. King recalled that he sought advice from Bishop prior to receiving notice of his selection for the position on July 18, 1987.
>
> On Saturday, July 18, 1987, King was informed by Major General Ivan F. Smith that he had been selected for the position of Command Sergeant Major for the Alabama National

Guard. King was told by General Smith that he would be called on July 10, 1987 with the particulars, but in fact King was not given his August 17, 1987 report date until August 7, 1987. King accepted the appointment, however, on July 18, 1987.

King informed Larry Presto, Vice President of General Clinical Services (and King's immediate supervisor), that he would be taking a position with the Alabama National Guard for a three-year period. King recalled that his conversation took place during the week of July 20 and Presto recalled this conversation's occurring around the first of August, but not in July. At this time, King did not know when he would assume his duties as State Command Sergeant Major and indeed did not discover until August 7 that his military service would begin on August 17.

King was very excited about becoming State Command Sergeant Major with the Alabama National Guard. He believed it to be a great honor even to be considered for such position and thought of it as a great personal honor to anyone. King did not receive a rank promotion, and his principal duties consist[ed] of advising the adjutant general. King accepted the position of Command Sergeant Major because he believed it was an honor to be selected as the number one enlisted person in the Alabama National Guard. He also believed that even though the position did not entail a promotion in rank, it would enable him to contribute his experience to the National Guard and help fulfill his perceived duty and obligation to his State and Nation.

At the time King first informed Presto of his selection as Command Sergeant Major, Presto had King go to the Hospital's publicity department, which resulted in an article's appearing in the Hospital's October 1987, monthly news magazine. Presto stated that he would do whatever Hospital policy and the law required with regard to King's leave request.

King's last day of work with St. Vincent's was August 14, 1987, and he began his three year tour as Command Sergeant Major on August 17, 1987, on which date he received his orders.

On September 1, 1987, King returned to St. Vincent's to help with the transition of his chairmanship of the Hospital's United Way Committee to his successor.

King's work as Manager of Security and then Protective Services was characterized by Presto as exemplary; Betty Williams, the Hospital's Vice-President for Human Resources, called him a very good employee with very good performance evaluations.

On September 8, 1987, after considering King's leave request and receiving advice of counsel, St. Vincent's notified King by letter from Executive Vice-President Vincent Donlon of its decision to deny his leave request. In denying King's request, St. Vincent's stated its belief that King's request did not qualify under the provisions of the Veterans' Reemployment Rights Act and that King's request for such a lengthy period of time was unreasonable.

The provision of the Veterans' Reemployment Rights Act governing King's right to request and receive a leave of absence from his employer is codified at

38 U.S.C. § 2024(d) which states in pertinent part as follows:

> [The] employee . . . shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, . . . such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes.

38 U.S.C. § 2024(d).

II. ISSUES

1. Is Section 2024(d) subject to a "reasonableness" test in its application?
2. Did the trial court err in finding that King's application for leave was *per se* "unreasonable" or, if not, should the judgment be affirmed because it was "unreasonable" under the circumstances of this case?

III. DISCUSSION

This Court and its predecessor, the Court of Appeals for the Fifth Circuit, have played a prominent part in the construction of Section 2024(d)[1], *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th

[1] In *Bonner v. City of Prichard*, (en banc), 661 F.2d 1206 (11th Cir. 1981), this Court adopted as binding precedent all of the decisions of the former Fifth Circuit decided prior to October 1, 1981.

Cir. 1987); *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir.1981). Although the *Lee* decision is binding precedent for this Court, in *Gulf States*, we stated: "[W]e are further articulating the legal reasonableness standard." 811 F.2d at 1468 (1987). Thus, we look to *Gulf States* for our guidance.

A. *"Per Se Unreasonable"*

As authorized under the Act, King was represented by the United States Department of Justice. Unlike the unsuccessful employee in *Lee* and the successful employee in *Gulf States*, the United States takes the position in this case, that "the plain language of 38 U.S.C. § 2024(d) does not place any limitations on the duration of a leave of absence protected by the Act." App.Br. p. 17. This Court in *Gulf States* rejected this argument if it was made.[2] This Court *stated*:

> Although the statute does not address the "reasonableness" of a reservist's leave request, the Fifth Circuit added a "reasonableness" gloss to Section 2024(d)'s requirements. *Lee*, 634 F.2d at 889. Thus, under *Lee*, a reservist's request must be reasonable to qualify for the protections of the Veterans' Reemployment Rights Act.

Gulf States, 811 F.2d at 1468. We thereafter stated:

[2] It should be noted that the employee plaintiff in *Lee*, who was not represented by the United States, agreed that a "reasonable" standard should apply to the interpretation of the Act. Nevertheless, this Court in *Gulf States* accepted that standard as binding on this Court. The opinion does not indicate that the United States took its current position that the language of Section 2024(d) could not be interpreted as requiring a showing of "reasonableness."

> Eliminating the impermissible factors from the inquiry [as applied by the trial court in that case], all that remains are *the length of the leave, Ingram's actions, and burden upon Gulf States* in filling her position during her absence. For an employer to succeed in proving a request unreasonable, it must overcome the presumption of reasonableness. [*Monroe v. Standard Oil Co.*, 452 U.S. 549, 101 S.Ct. 2510, 69 L.Ed.2d 226 (1981)]. Following *Lee*, the weightiest factor in overcoming that presumption is the conduct of the employee.

Gulf States, 811 F.2d at 1469 (emphasis added). That factor, of course, requires us to consider the good faith of the employee. In *Gulf States*, we stated: "Bad faith conduct might also be shown through requests for leaves of exceptional duration." 811 F.2d at 1470 n. 4. In considering the issue involved in the length of the leave, we stated: "We agree that although one year is not *per se* unreasonable, a greater length of time might reach that level." *Id.* at 1469.

The government contends that these statements by us in *Gulf States* are *dicta*. Nevertheless, we consider them as providing guidance in deciding the present case. The statements were used in our attempt carefully to describe the elements that a court must consider in determining whether a request for leave is reasonable.

Significantly, the Court of Appeals for the Third Circuit in its decision in *Eidukonis v. Southeastern Pennsylvania Transportation Authority*, 873 F.2d 688 (3rd Cir.1989), adopted as the law of the Third Circuit our decisions in *Gulf States* and *Lee*. Although there was a dissenting opinion in *Eidukonis*,

the dissenting judge agreed that the statute should be construed under a standard of reasonableness. The dissent pointed out that:

> it has long been a maxim of statutory construction that " '[g]eneral terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character.' " *Government of Virgin Islands v. Berry*, 604 F.2d 221, 225 (3rd Cir.1979) (quoting *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-87, 19 L.Ed. 278 (1868)). Were we to read Section 2024(d) as creating an absolute right of reinstatement, reservists would be allowed to play fast and loose with the system in a way that Congress could not have intended.

Eidukonis, 873 F.2d at 699. The Court of Appeals for the Fifth Circuit has articulated this standard of construing a federal statute most aptly in *United States v. Mendoza*, 565 F.2d 1285 (5th Cir.1978). In that case, the Court of Appeals for the Fifth Circuit stated:

> In the celebrated *Holy Trinity Church* case, *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1982), the Supreme Court held that if a literal construction of the words of a statute would lead to an absurd, unjust or unintended result, the statute must be construed so as to avoid that result.

565 F.2d at 1288.

We are, of course, bound by the previous decisions of this Court applying the "reasonableness" test. However, we note that even were we not so bound, we would independently arrive at the same result. Moreover, as the Court in *Eidukonis* said:

> The Supreme Court has also signified such an interpretation of the legislative history since it stated that the provision 'now codified at 38 U.S.C. 2024(d), was enacted in 1960 to deal with problems faced by employees who had military training obligations lasting less than three months.' *Monroe*, 452 U.S. at 555 [101 S.Ct. at 2514].

Eidukonis, 873 F.2d at 693.

As noted above, the trial court found that the three year leave of absence in this case would be *per se* unreasonable. It, therefore, becomes incumbent on us to determine whether such an interpretation of the statute is necessary to prevent an absurd, unjust, or unintended result. We conclude that it is.

The trial court, after carefully considering the three factors which we stated in *Gulf States* were applicable to a reasonableness determination, stated:

> The court . . . cannot say that King's conduct (apart from the mere act of requesting a three year leave) rises to the level of that "conduct akin to bad faith" contemplated by *Gulf States*. However, "bad faith conduct might also be shown through requests for leaves of exceptional duration." *Gulf States*, 811 F.2d at 1470 n. 4.

It is thus clear that the court construed the length of the requested leave of absence in the context of

the conduct prong which we articulated in *Gulf States*. We also think that the determination whether a three year leave was unreasonable was partially dependent upon the harm to the employer. Although the burden on the employer was partially weighted by the adoption of the statute by Congress, no one could doubt that a longer leave would inevitably be more burdensome on an employer than a short leave. This Court in *Gulf States* stated that "bad faith conduct might also be shown through requests for leave of exceptional duration." We hold, especially in light of the Supreme Court's statement in *Monroe* that this section of the statute was passed "to deal with problems faced by employees who had military training obligations lasting less than three months," *Monroe*, 452 U.S. at 555, 101 S.Ct. at 2514, and, in view of the self-contradictory legislative history of the section, that it is appropriate for this Court to determine a definite limit beyond which any leave would be unreasonable.

No case has been called to our attention in which a leave of absence of as long as three years has been held protected under Section 2024(d). We, therefore, agree with the trial court that a three year leave of absence is *per se* unreasonable.

B. *Unreasonableness on Factors Present in this Case*

Moreover, even if we should find that the trial court erred in finding a three year leave *per se* unreasonable, we would nevertheless hold that on the facts of this case, considering the factors outlined in *Gulf States*, the judgment of the trial court should be affirmed.

IV. CONCLUSION

The judgment is AFFIRMED.

RONEY, Senior Circuit Judge, specially concurring:

I agree with the Court's holding that Sky King's three-year leave request was unreasonable on the facts of this case. I dissent from the adoption of a per se rule. Not only is such a rule unnecessary to the resolution of this case, but it might work an injustice in some future case.

Appellant cites the case of *Lemmon v. Santa Cruz County, California*, 686 F.Supp. 797 (N.D.Cal.1988), which involved a three-year leave request originally made under section 2024(d). In *Lemmon*, a different statutory provision came to apply only after the reservist commenced active duty, and only because his duty assignment was changed. The *Lemmon* court nevertheless applied section 2024(d) case law, including this Circuit's reasonableness test, found a three-year leave *reasonable* on the facts of that case and refused to adopt a three-year-is-per-se-unreasonable rule.

Lemmon illustrates that circumstances may arise in which three-year leave requests, even under section 2024(d), should be granted. In *Lemmon*, the reservist was a Sheriff's Office employee whose position the employer "was able to fill . . . in one day by simply reassigning other personnel within the department." 686 F.Supp. at 802. The employer had initially approved the leave request. Yet, a three-year per se rule would have precluded the statutory relief to which the reservist was entitled.

Fairness dictates that each case be decided with due regard for the particular facts. While bright-line rules certainly have the advantage of mechanical application, it seems unnecessary in the administration of this statute.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV87-H-1844-S

ST. VINCENT'S HOSPITAL, PLAINTIFF

vs.

WILLIAM "SKY" KING, DEFENDANT

[Filed Apr. 21, 1989]

MEMORANDUM OF DECISION

St. Vincent's Hospital instituted this action on October 16, 1987 seeking a declaration that it had not violated the terms of the Veteran's Reemployment Rights Act by refusing to grant its employee, William "Sky" King, a three-year leave of absence from work to serve as Command Sergeant Major in the Alabama National Guard. The Hospital also seeks a declaration that King has no rights to reemployment (under the Act) upon completion of his tour of duty.

No material fact in this action is disputed by the parties. Pursuant to stipulation by the parties, the court has taken the case under submission on the basis of (1) a "Statement of Agreed Facts" and (2)

the deposition testimony (with exhibits) on file with the court. Also before the court are the parties' arguments in brief and the parties' respective positions regarding portions of the deposition testimony on file.

The undisputed facts are as follows.[1] King was employed by the Hospital on September 24, 1979, as manager of its security department. (The department was subsequently renamed Protective Services in 1987.) King supervised twenty-one employees in his department including three full-time supervisors. He advised the Hospital on many matters pertaining to the safety and welfare of its employees and patients.[2]

King characterized his position with the Hospital as a fairly high profile public relations position. The job involved constant contact with patients, employees, and the general public.[3] He also had to deal

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[1] This summary is adopted from the parties' "Statement of Agreed Facts."

[2] During the course of his employment, King has been involved in criminal investigations on behalf of the Hospital. Presently, there are two lawsuits pending against the Hospital arising out of criminal investigations personally conducted by King. In addition to criminal investigations, King was involved in the Hospital's security efforts during a union organization campaign eight years ago. In addition, King served as chairman of the Hospital's Safety Committee which makes many decisions relative to the Hospital's accreditation process and the Hospital's compliance with OSHA standards and other federal standards.

[3] The Hospital noted in its "Submission of Deposition Testimony" that it faces many unique security problems due to its size, its easy accessibility by the public, and the existence of drugs and other expensive medical equipment on the Hospital's premises.

with the Hospital's professional staff of doctors on a daily basis.

King has been a reserve member of the Alabama National Guard for thirty-five years. During his employment with St. Vincent's King served on numerous tours of training, some of which were military leaves of absence from St. Vincent's and some which [*sic*] were taken on his his own vacation time, personal days off, or weekends when he was not scheduled to work.

While on an annual two week National Guard leave in June, 1987, King submitted an application for the position of State Command Sergeant Major for the Alabama National Guard. The Command Sergeant Major is an advisor to the Adjutant General on all matters concerning the performance, training, appearance and conduct of enlisted personnel. King knew this was a full time position with the Alabama National Guard and that it required a three-year commitment.

Upon his return to work in late June, King did not inform anyone at the Hospital that he had applied for the Command Sergeant Major position.

King checked on his reemployment rights by telephoning James A. Bishop, a reemployment compliance specialist with the Veterans Reemployment Rights office in Atlanta, Georgia. Bishop advised King that he could serve up to four years on "active duty" and have reemployment rights under the Veterans' Reemployment Rights Act.[4] King recalled that

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[4] The Hospital does not dispute that "King told Bishop all he knew regarding his tour of duty and military leave request" nor that "Bishop told King that he had an absolute right to take a three year military leave."

he sought advice from Bishop prior to receiving notice of his selection for the position on July 18, 1987.

On Saturday, July 18, 1987, King was informed by Major General Ivan F. Smith that he had been selected for the position of Command Sergeant Major for the Alabama National Guard. King was told by General Smith that he would be called on July 10, 1987 with the particulars, but in fact King was not given his August 17, 1987 report date until August 7, 1987. King accepted the appointment, however, on July 18, 1987.[5]

King informed Larry Presto, Vice President of General Clinical Services (and King's immediate supervisor), that he would be taking a position with the Alabama National Guard for a three-year period. King recalled that this conversation took place during the week of July 20, and Presto recalled this conversation's occurring around the first of August, but not in July.[6] At this time, King did not know when he would assume his duties as State Command Sergeant Major and indeed did not discover until August 7 that his military service would begin on August 17.

King was very excited about becoming State Command Sergeant Major with the Alabama National Guard. He believed it to be a great honor even to

[5] King accepted the appointment without having first discussed the appointment/leave with his supervisors at the Hospital.

[6] King asserts that also during the week of July 20, 1987, he approached James Nelson, one of his employees, about the possibility of Nelson's replacing him during his tour of duty. King then advised Presto of Nelson's willingness to assume the position during his absence. The Hospital chose someone else, however, to replace King on his departure.

be considered for such position and thought of it as a great personal honor to anyone. King did not receive a rank promotion, and his principal duties consist of advising the adjutant general. King accepted the position of Command Sergeant Major because he believed it was an honor to be selected as the number one enlisted person in the Alabama National Guard. He also believed that even though the position did not entail a promotion in rank, it would enable him to contribute his experience to the National Guard and help fulfill his perceived duty and obligation to his State and Nation.

At the time King first informed Presto of his selection as Command Sergeant Major, Presto had King go to the Hospital's publicity department, which resulted in an article's appearing in the Hospital's October 1987, monthly news magazine. Presto stated that he would do whatever Hospital policy and the law required with regard to King's leave request.

King's last day of work with St. Vincent's was August 14, 1987, and he began his three year tour as Command Sergeant Major on August 17, 1987, on which date he received his orders.

On September 1, 1987, King returned to St. Vincent's to help with the transition of his chairmanship of the Hospital's United Way Committee to his successor.

King's work as Manager of Security and then Protective Services was characterized by Presto as exemplary; Betty Williams, the Hospital's Vice-President for Human Resources, called him a very good employee with very good performance evaluations.[7]

[7] Betty Williams testified in deposition as follows:

> . . . [W]e felt that Sky was acting in good faith; we felt that he was acting on the advice of Mr. Bishop, and he

On September 8, 1987, after considering King's leave request and receiving advice of counsel, St. Vincent's notified King by letter from Executive Vice-President Donlon of its decision to deny his leave request. In denying King's request, St. Vincent's stated its belief that King's request did not qualify under the provisions of the Veteran's Reemployment Rights Act and that King's request for such a lengthy period of time was unreasonable.

The provision of the Veteran's Reemployment Rights Act governing King's right to request and receive a leave of absence from his employment is 38 U.S.C. § 2024(d),[8] which states in pertinent part as follows:

> [The employee] shall upon request be granted a leave of absence by [his] employer for the period required to perform active duty for training . . . in the Armed Forces of the United States. Upon [his] release . . ., [he] shall be permitted to return to [his] position with such seniority, status, pay, and vacation as [he] would have had if [he] had not been absent.

In evaluating King's leave request in light of the above provision, *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464, 1469 (11th Cir. 1987) requires the court to uphold the leave request if it is reasonable in light of three factors: (1) the length of the leave,

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had accepted Mr. Bishop's word totally, completely, one hundred percent. We did not feel there was any bad faith on Sky's part at all; we felt that perhaps he had gotten some poor advice.

[8] King received his orders pursuant to 32 U.S.C. § 502(f). Under 38 U.S.C. § 2024(f), full-time duty performed by a member of the National Guard under § 502 is considered "active duty for training" under § 2024(d).

(2) King's conduct, and (3) the burden upon the Hospital in filling King's position during his absence.

King begins with the presumption that his leave request is reasonable. As stated in *Gulf States*:

> We begin with the admonition to liberally construe reemployment rights statutes in favor of those who serve their country. [citations omitted] Next, we acknowledge that Congress is in the best position to weight the benefits to reservists against the burdens upon employers. [citation omitted] In light of these considerations, any judicial inquiry into the reasonableness of leave requests must be limited and extremely deferential to the reservists's rights. The reservist begins with a presumption that her leave request is reasonable.

Gulf States, 811 F.2d at 1468-69. The Hospital bears the burden of overcoming the presumption of reasonableness. Of the three factors, "the weightiest factor" in overcoming the presumption is the employee's conduct. As stated in *Gulf States*:

> The length of the [one-year] leave here places a substantial burden upon the employer in finding and training a replacement. However, burden to the employer alone is not enough to mark a leave request as unreasonable. If it were, every leave would be unreasonable because all leaves generate costs for the employer. . . . Thus, . . . there must be something beyond burden to the employer to reach the unreasonable level. The "something more" is the questionable conduct of the employee . . . In the absence of that type of conduct, [footnote omitted] the reasonableness test most likely will be satisfied.

Gulf States, 811 F.2d at 1469-70.

In evaluating King's conduct, the court is directed to "look for conduct akin to bad faith." *Gulf States*, 811 F.2d at 1469. The Hospital points the court to the following conduct by King: (1) his failure to inform anyone at the Hospital of his pending application for the three-year position of Command Sergeant Major; (2) acceptance of the position without prior consultation with the Hospital; (3) his request for a leave of exceptional duration. As stated by the Hospital in brief:

> Mr. King never discussed his leave request with the Hospital other than by simply informing the Hospital that he would be leaving and under the law the Hospital was required to grant his leave request. St. Vincent's did not know and could not discover until after it received a copy of Mr. King's orders what provision he was being called under and accordingly could not advise Mr. King whether his leave request would be granted or denied until after Mr. King had left.
>
> Regardless of whether or not Mr. King was entitled to the leave of absence from the Hospital, he would have taken the position with the Alabama National Guard. Mr. King completely ignored the difficulties faced by the Hospital because (1) he believed he had an absolute right to his leave request and (2) even if he didn't, he was going anyway. The fact that Mr. King had no subjective bad faith does not relieve him of the responsibility for his actions and conduct in the present case. . . . Mr. King's conduct is akin to bad faith.

The court disagrees. It cannot say that King's conduct (apart from the mere act of requesting a

three-year leave) rises to the level of that "conduct akin to bad faith" contemplated by *Gulf States*. However, "[b]ad faith conduct might also be shown through requests for leaves of exceptional duration." *Gulf States*, 811 F.2d at 1470, n.4.

In addition, *Gulf States* suggests that some leaves might be considered *per se unreasonable* due solely to their length, without any regard to the employee's conduct or the burden placed upon the employer. *Gulf States*, in upholding a one-year leave, stated the following:

> [The district court] correctly considered the length of time of the requested leave. We agree that although one year is not *per se* unreasonable, a greater length of time might reach that level.

This court holds that three years "reach[es] that level." This holding is not in derogation of the other two factors. Indeed, as pointed out in *Gulf States*, a request for a leave of exceptional length might reflect bad faith on the part of the employee. In addition, a long leave would significantly increase the burden borne by the employer.[9]

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[9] Ms. Williams, Vice-President of Human Resources, testified in deposition as follows:

> I believe that three years is too long to have an interim manager in a department. Through our past experience we have found that with interim managers they're very reluctant to make decisions that need to be made, to make changes because they know that this is something, you know, that someone else is going to have to live with down the line, and things just don't get done. There seems to be a status quo in these situations, and we felt that for a year perhaps that would have been fine, but for

In summary, the court holds that the instant three-year leave is per se unreasonable. The Hospital did not violate § 2024(d) of the Veteran's Reemployment Rights Act by refusing to grant King's request for a three-year leave of absence. King accordingly has no rights to reemployment flowing from § 2024(d) upon completion of his tour of duty.

A separate order of final judgment in the Hospital's favor shall be entered contemporaneously herewith.

DONE this 21st day of April, 1989.

/s/ James H. Hancock
United States District Judge

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three years the way our organization changes, we could not tolerate that.

* * * * *

. . . I think this has a serious impact on the department and on the hospital at that point. We're going through that now; the acting person is having a difficult time because he is interim. He doesn't want to make changes if he's not going to be in that department, you know, long term, and that's what traditionally happens.

* * * * *

. . . I don't care who the individual is—now obviously the severity of the impact would depend on the individual, okay? But I don't think any new person who is an interim manager will be comfortable enough to manage the department as effectively as someone who knows that's their job and that they are ultimately responsible and will be responsible down the line. This has been our experience.

Williams, Deposition at 25, 46, 47. Ms. Williams's deposition testimony (at p. 42) that she did not "know of any specific difficulties with the interim manager" does not negate the above testimony.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. CV87-H-1844-S

ST. VINCENT'S HOSPITAL, PLAINTIFF

vs.

WILLIAM "SKY" KING, DEFENDANT

[Entered Apr. 21, 1989]

FINAL JUDGMENT

In accordance with the Memorandum of Decision entered this day, it is hereby

ORDERED, ADJUDGED and DECREED that judgment in favor of the plaintiff is hereby ENTERED.

Costs are taxed against the defendant.

DONE this 21st day of April, 1989.

/s/ James H. Hancock
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-7392

ST. VINCENT'S HOSPITAL, a corporation,
PLAINTIFF-APPELLEE

versus

WILLIAM "SKY" KING,
DEFENDANT-APPELLANT

[Filed Aug. 21, 1990]

Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING

(August 21, 1990)

BEFORE: TUTTLE*, RONEY* and HILL*, Senior Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant WILLIAM "SKY" KING, is denied.

ENTERED FOR THE COURT:

/s/ Elbert Butler
United States Circuit Judge

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-7392

ST. VINCENT'S HOSPITAL, a corporation,
PLAINTIFF-APPELLEE

versus

WILLIAM "SKY" KING,
DEFENDANT-APPELLANT

[Filed Aug. 29, 1990]

Appeal from the United States District Court
for the Northern District of Alabama

SUGGESTION FOR REHEARING EN BANC

(August 29, 1990)

BEFORE: TUTTLE*, RONEY* and HILL*, Senior Circuit Judges.

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

PER CURIAM:

No Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
Chief Judge

APPENDIX F

ALABAMA

STATE MILITARY DEPARTMENT
Office of the Adjutant General
P.O. Box 3711
Montgomery, Alabama 36193-4701

ORDERS 158-1 17 August 1987

KING, WILLIAM D 420-40-6747 CSM HQ STARC AL ARNG, Montgomery, Alabama 36193-4701

You are ordered to full-time duty (State) in Active Guard/Reserve status in the grade shown above for the period indicated. Upon completion of the period of duty, unless sooner released or extended by proper authority, you will return to the place where you entered duty and be released from such duty. You will proceed in time to report on the date shown below.

Report to: State Military Department, Montgomery, Alabama 36193-4701

Reporting date: 17 August 1987

Assigned to: HQ STARC, AL ARNG, Montgomery, Alabama 36193-4701

Attached to: N/A

Period (full-time duty commitment): Three (3) Years (17 Aug 87 - 16 Aug 90)

Add instr: By issue and acceptance of this order, indiv affected and State auth consent to placing the indiv affected automatically on active duty under Title 10 USC 672(d) for duration of duty directed OCONUS TDY, upon compl of which indiv will

revert automatically to full-time duty (State). If in the event of mobilization, indiv affected is ordered to active duty under auth of Title 10, USC, the unexecuted portion of this order will terminate automatically the day prior to mobilization date. AGR tours for FY88/89/90 are subj to avail funds. Indiv ordered to AGR with his/her consent and the consent of the Gov of Al. Cont of tour is subj to indiv being granted SECRET Scty C1 if required. Indiv auth RNA subs. Indiv entitled to CMAB/CMAS. Indiv auth BAQ at the with dependent rate (BAQPD). Successful compl of required NGB Military Education Program (MEP) tng is necessary for continued AGR service. ACT-GRD-RESIDENT: 32 USC 502(f). ACT-STAT-PROG: READINESS SUPPORT MISSION. Initial tour. First year probationary period.

FOR ARNG/ARMY USE

Auth: 32 USC 502(f) and sec 502, Public Law 98-94. Do not access into the strength of active army.

Acct clas: ARNGAL FY87/88/90/90 BP/ALWS/Other Pay/FICA 2172060/2182060/2192060/2102060 18-99 P3153.16 1199/1250 S99999.

Number of days lump sum leave pd since 10 Feb 76: None.

SPMD POS: State Command Sergeant Major, TDA WBASAA, Para 001 Lin 07, E9, 00Z50

PMOS/SSI: 00Z50

HOR: 728 Barclay Lane, Birmingham, AL 35206

SEX: Male

Format: 175

UIC (of assignment): WBASAA (200)

Security Clearance: SECRET

PEBD: 9 Dec 53

JUMPS AA Payroll Prefix: 6 ARNGAL

BY ORDER OF THE GOVNERNOR:

DISTRIBUTION:
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